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February 13, 2012

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Basic Service Tier Encryption; Compatibility Between Cable
Systems and Consumer Electronics Equipment,*
MB Dkt. No. 11-169, PP Dkt. No. 00-67

Dear Ms. Dortch:

Boxee, Inc. ("Boxee") writes in response to a letter filed by NCTA in this docket on February 7, 2012.¹ The NCTA Letter argues against Boxee's presentation of harms to consumers and competition not addressed in the Notice of Proposed Rulemaking in the above-referenced docket.² Yet rather than respond to the explanations of such harms set forth in the Boxee Presentation, the NCTA devotes twelve pages to repeating misstatements and flawed arguments already addressed by Boxee,³ and suggests that rather than take the time to consider the consumer harms noted by Boxee and others,⁴ the Commission instead "move forward as quickly as possible to permit encryption."⁵ As set forth below, such premature action would only benefit cable companies, not consumers or device competition.

¹ See Letter from Neal M. Goldberg, Vice President and General Counsel, National Cable & Telecommunications Association, to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 7, 2012) (the "NCTA Letter").

² See Letter from Melissa Marks, General Counsel, Boxee, Inc., to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 2, 2012) and attachment thereto (the "Boxee Presentation").

³ See Boxee Presentation at 19-21 (responding to Letter from Neal M. Goldberg, Vice President and General Counsel, National Cable & Telecommunications Association, to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Dec. 29, 2011)).

⁴ See, e.g., Letter from John Bergmayer, Senior Staff Attorney, Public Knowledge ("PK"), to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Feb. 8, 2012) (the "PK Letter"); Letter from Robert S. Schwartz, Counsel to Consumer Electronics Association and AllVid Tech Company Alliance, to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Jan. 6, 2012). We note that NCTA and Cablevision cite PK as a supporter of the proposed rule (NCTA Letter, note 42; Reply Comments of Cablevision Systems Corporation at (Dec. 12, 2011)), however, this most recent filing makes clear that PK is not in support of proceeding to final rulemaking at this time.

⁵ NCTA Letter at 2.

Encryption As Currently Proposed Benefits Cable Companies, Not Consumers.

The NCTA Letter argues that the primary consumer benefit of encryption is to reduce the time wasted by consumers waiting for the cable guy, citing evidence that economic losses incurred by consumers waiting for cable technicians is in the range of tens of billions of dollars per year.⁶ NCTA fails to point out, however, that Clear QAM is not the cause of home installation appointments; most major cable providers already offer self installation kits that use remote activation despite the availability of Clear QAM, and permit remote disconnects with customers later dropping their old set top boxes at a cable office.⁷ And while filters to block Clear QAM signals must be physically added or removed by a technician, in most cases, this is usually done at a box outside the home and could be done without a customer's presence – the requirement that a customer be home is solely to enable a technician to install, activate, and test the set top box. This rulemaking is no more about concern for consumers' schedules than it is about the environment.⁸ Remote connects and disconnects are already possible, but eliminating Clear QAM enables cable providers to save money on truck rolls needed to do work outside of customers' homes, and make money on millions of additional deployed set top boxes.⁹

The NCTA Letter also touts the alleged consumer benefits of eliminating what the NCTA refers to as cable "theft," namely the ability of customers subscribing only to broadband Internet to access Clear QAM via the same cable connection.¹⁰ This "theft," really a technological limitation that would be eliminated by IP delivery of cable content, can currently be prevented using the afore-mentioned filters installed outside a user's home. Cable companies have simply made the business decision that installing such technology in broadband-only homes is not a priority, and would prefer to save money by eliminating *all* consumers' ability to receive Clear QAM.

⁶ *Id.* note 4 (citing Josh Sanburn, *We Lost \$38 Billion Last Year Just Waiting Around for the Cable Guy*, Time Moneyland (Nov. 4, 2011), available at <http://moneyland.time.com/2011/11/04/we-lost-38-billion-last-year-just-waiting-around-for-the-cable-guy/>). That the NCTA cites an article focused on the failures of cable companies customer service policies, even escalating to the point that the Los Angeles Attorney's office sued Time Warner Cable, as a good reason to pass this rule making is somewhat puzzling, but appropriate.

⁷ See, e.g., <http://www.timewarnercable.com/texas/support/selfinstall/>; <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1080&SCRedirect=true>.

⁸ We note that the NCTA Letter does not mention the environmental benefits described in prior filings. See NCTA Comments, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Nov. 28, 2011). Cf. Boxee Presentation at 18; Avner Ronen, "Cable Companies Want Government to Help Them Increase Your Bill & Limit Competition," <http://blog.boxee.tv/2012/02/08/cable-companies-want-government-to-help-them-increase-your-bill-limit-competition/#.TzV8KExSTRU>.

⁹ See Boxee Presentation at 16-18 (estimating that 10-20 million set top boxes may be deployed as a result of encryption).

¹⁰ See NCTA Letter at 3-4 (citing Letter from Michael Nilsson, Counsel to RCN, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Jan. 24, 2012)).

Finally, NCTA puts forth as a consumer benefit expediting cable companies' migration to all-digital systems and enabling the deployment of IP services.¹¹ Yet the issues of moving to all-digital systems and encrypting Clear QAM are entirely separate; in fact the digital migration is already well underway, and is actually a prerequisite to encryption under the proposed rule.¹² Boxee strongly encourages all cable providers to move to all-digital systems, and looks forward to having the spectrum freed by eliminating inefficient analog signals instead be used to deliver faster high speed internet and other services to customers – *those* are consumer benefits, and by NCTA's own logic, should provide incentive to undertake such migration. To delay the move to digital systems unless given permission to encrypt Clear QAM, thereby forcing additional hardware rental costs on millions of consumers and hindering device compatibility, in no way benefits consumers.

NCTA Continues to Disregard the Consumer Harms Caused by Encryption.

The NCTA Letter makes baseless accusations about the legitimacy of data Boxee has provided from its servers regarding Clear QAM usage of Boxee Live TV customers,¹³ yet such disbelief only underscores NCTA's lack of information regarding Clear QAM usage rates. Like previous filings, the NCTA Letter fails to supply any data regarding Clear QAM usage by cable customers or projections of the total number of set top boxes that will be deployed as result of encryption. NCTA states, without citation, that "record evidence" shows the "overwhelming majority" of customers use set top boxes or CableCARD devices, and a "very small number" use Clear QAM devices.¹⁴ In fact, the NPRM states "that over three-quarters of cable subscribers have *at least one* device in their home that can both demodulate and decrypt."¹⁵ In light of Nielsen's estimate that there are 2.93 televisions per household in the U.S., the data suggests that a significant number of U.S. cable subscribers will be affected should this rule be passed.¹⁶

¹¹ NCTA Letter at 4.

¹² See NPRM, Appendix A at 14.

¹³ NCTA Letter at 7-8. NCTA's assertion that Boxee's interest in the NPRM must be disingenuous because Boxee Live TV is marketed as a cord-cutting device holds no water. Boxee's website as well as the Boxee Live TV installation guide make clear that for users without OTA reception, Boxee Live TV can be connected to Clear QAM and used to "shave the cord." See www.boxee.tv/live; <http://support.boxee.tv/entries/20688733-live-tv-faq> ("If you don't have reception in your area you may not be ready to cut the cord, but you may be able to give it a serious shave. Call your cable company and ask for basic cable.").

¹⁴ NCTA Letter at 9, *see also id.* at 2.

¹⁵ NPRM at 7 (emphasis added).

¹⁶ See <http://blog.nielsen.com/nielsenwire/consumer/u-s-homes-add-even-more-tv-sets-in-2010/>; *see also* Boxee Presentation at 16. While some of these subscribers may be entitled to transitional relief under the proposed rule, many will not. *See, e.g.* Letter from Melissa Marks, General Counsel, Boxee, Inc., to Marlene H. Dortch, FCC, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Dec. 21, 2011) (the "Boxee December Letter"); Boxee Presentation at 20; Comments of Public Knowledge and Media Access Project ("PK/MAP"), MB Dkt. No. 11-169,

While other cable operators may anticipate an encryption experience similar to Cablevision's,¹⁷ Boxee hesitates to take Cablevision's waiver results as representative. New York City is one of the wealthiest metro areas in the nation, and one where space is at a premium – as such New Yorkers can be expected to have fewer TVs and more premium services than consumers in other markets. Additionally, the number of subscribers that requested free set top boxes likely underrepresents the number actually affected by the waiver, for reasons such as the request having to be made 30 days prior to or 30 days after the initial encryption, free boxes being unavailable to anyone moving to the waiver area (even if they used Clear QAM at their last residence), and anyone who was upsold, e.g., to a box with DVR, not being included in the count, even if they would have preferred no box at all over a box with DVR.¹⁸

Boxee Seeks To Avoid Unnecessary Consumer Harms, Not to Receive Special Treatment.

The efficiencies sought by cable providers can be achieved without major harms to consumers and leading technology innovators like Boxee, Hauppauge, SiliconDust, Elgato or SimpleTV,¹⁹ not to mention the owners of every recently made TV in the market today, which would cease to function without a set top box. Boxee believes that a viable solution will necessarily accommodate all parties, and, contrary to NCTA's repeated assertions, has never requested a "special fix" addressing only Boxee.

As made clear in earlier filings on this docket, Boxee supports adoption of an open IP standard that permits free competition within the set top box space, such as the Commission called for in the National Broadband Plan.²⁰ Boxee has never called Clear QAM the "future of technological innovation" or suggested it is a long-term solution; just as NCTA acknowledges that CableCARD is not a forward-looking, long-

PP Dkt. No. 00-67 (Nov. 28, 2011); Reply Comments of PK/MAP, MB Dkt. No. 11-169, PP Dkt. No. 00-67 (Dec. 12, 2011).

¹⁷ See NCTA Letter at 9; *id.* note 36.

¹⁸ See Letter from Howard J. Symons, Counsel to Cablevision, to Marlene H. Dortch, FCC, MB Dkt. No. 09-168 (Jan. 7, 2010) and attachment thereto.

¹⁹ On the point of innovation, we note that SimpleTV recently won a 2012 Best of CES Award. See <http://ces.cnet.com/best-of-ces/>.

²⁰ See Connecting America: The National Broadband Plan (Mar. 16, 2010) Ch. 4, at 36, 49-52; Boxee Presentation at 26. The NCTA suggests that Boxee's support for AllVid or a similar open standard is false, conjecturing that if Boxee did not support CableCARD, it cannot be in support of AllVid. As explained in the Boxee Presentation, the two standards are not cut of the same cloth – Boxee supports an open software-based standard that will foster development of innovative products compatible with MVPD content and services as providers move to digital and IP delivery, a position entirely consistent with not developing to an interim solution burdened by hardware-based limitations and higher costs to consumers.

term solution.²¹ The future is IP. By NCTA's own admission, cable operators recognize that they can "leverage IP to provide new applications and other innovative services to customers on a wide range of devices" "without the need for a set-top box;" ²² Boxee wholly agrees and eagerly awaits a Commission proceeding proposing an open IP standard that can achieve the NCTA's goals surrounding reduced truck rolls, while fostering innovation in the competitive device market and avoiding increased hardware costs to consumers. But for cable companies to be permitted to eliminate Clear QAM before adopting such a standard or other means of open access to broadcast channels, would be to take a large competitive step backwards, without any counterbalancing forward motion.

The Commission should therefore reject NCTA's self-interested call for expedited action, as the interests of consumers and competition require that Clear QAM remain available until an alternative means of compatibility enables non-MVPD consumer devices to obtain access to the basic tier in a way that does not require additional hardware, fees beyond the cost of a basic tier subscription, or the certification or explicit consent of MPVDs.

Pursuant to the Commission's rules, this notice is being filed in the above-referenced dockets for inclusion in the public record.

Respectfully Submitted,

/s/ Melissa Marks

Melissa Marks
General Counsel

cc: Julius Genachowski
Sherrese Smith
William Lake
Alison Neplokh
Michelle Carey
Mary Beth Murphy

²¹ See, e.g., NCTA Comments on National Broadband Plan Public Notice #27 ("NBP PN #27") at 30 (describing CableCARD's form factor as 10 years old and at a technological disadvantage to IPTV and other new technologies). While the Commission has taken steps to address CableCARD difficulties, they have not been eliminated as suggested by NCTA. See Gabe Gagliano, "CableCARD Trials and Tribulations," available at <http://www.techofthehub.com/2012/02/cablecard-trials-and-tribulations.html>. Boxee has previously addressed in depth the shortcomings of CableCARD as a development standard. See Boxee Presentation at 14-15; Boxee December Letter at 2.

²² NCTA Letter at 4; *id.* at note 15.